

## Briefing on non-regression in the Environment Bill

4 October 2018

### Introduction

'Non-regression' is an environmental legal concept that has received increasing levels of attention over recent years. It is conceptually simple: at its heart, it requires that environmental regulation and standards should not be diminished, promoting a ratcheting up of ambition in subsequent law reform and policy.

A strong version of non-regression does not simply prevent rollback but requires continual advancement in environmental laws and commitments. This is sometimes termed the 'progression' principle and is reflected in the Paris Agreement's requirement that all new "nationally determined contributions [to emission reduction] will represent a progression" beyond current commitments.<sup>1</sup>

It is important to note that the non-regression principle applies to environmental laws, regulations, policy and standards, not to the condition of the environment itself. That is, non-regression does not directly prohibit a deterioration in the state of the environment (though its proper implementation ought to result in this), but rather prohibits a diminution in environmental standards.

Non-regression protects both current and future generations against falling environmental standards and will be an invaluable tool in meeting the UK Government's commitment to be the first generation to leave the environment in a better state than we found it.

### Political context

The idea of a non-regression principle has emerged within the Brexit negotiations as a potential component of a future UK-EU Partnership Agreement, including in the UK Government's July 2018 white paper on the future relationship.<sup>2</sup>

While a set of reciprocal non-regression commitments, binding both parties, should be included as a component in the future UK-EU Partnership Agreement, Greener UK also advocates for a non-regression principle to be incorporated in standalone domestic law in the UK. This briefing refers to the domestic context, and in particular the upcoming Environment Bill.

In any case, the precise legal formulation will be critical. It must be strong, it must be broad, and it must be enforceable.

### Emergence of non-regression

Non-regression has its origins in international human rights law, which requires the 'progressive realisation' of economic, social and cultural rights.<sup>3</sup> It is now receiving increasing recognition in the environmental context, and is an emerging norm of international environmental law.

Both the 2015 IUCN Draft Covenant and the 2017 Draft Global Pact for the Environment contain non-regression commitments, as does the 2018 Escazú Agreement that mirrors the Aarhus Convention for the Americas.<sup>4,5,6</sup>

The principle also appears within domestic legislation. France has recently incorporated non-regression into its Environmental Code and it can also be found in the Ecuadorian Constitution.

French courts have issued a number of judgments on the application of the principle, and have found both for and against its breach. This demonstrates that the principle is justiciable, having a meaningful 'hard edge'. In case of a breach, French courts have struck down regressive measures taken by the government.<sup>7,8,9,10</sup>

Non-regression is also a common feature of existing free trade agreements. However, these non-regression commitments are frequently lacking in scope and in bite. They fail to prohibit all forms of regression in environmental law (instead only preventing regression that is linked to attempts to gain a trade or economic advantage). They are also hard to enforce, and they do not cover essential components of environmental law such as its implementation and enforcement in practice.<sup>11</sup>

Non-regression in trade agreements is thus of a very different nature to what is under discussion here. Properly understood, non-regression is a principle of environmental law, not trade law, and should be treated as such. Its primary purpose should be to safeguard environmental standards, not to provide equitable conditions for trade (although they may support this outcome).

## **Non-regression of what?**

While it is clear from the above that the scope of a non-regression principle must be broad, a definition of what counts as regression is still needed. Clearly, there should not be an over-reliance on the intended consequences of government action: any actual reduction in environmental standards ought to be prohibited. Equally clearly, any attempts to remove or weaken crucial aspects of environmental law relating to its proper oversight and governance must also be within the principle's scope.

The details of non-regression ought to be contained in the Principles Policy Statement, addressing the substance, governance and processes of environmental law. The application of non-regression should not be limited to central government, but instead extend to all public authorities whose functions could result in the lowering of environmental standards.

While non-regression operates from a moving baseline (i.e. once a new law or policy has been adopted, it must not be regressed on), it does not require any particular future action. Therefore, claims that a non-regression principle in domestic law would require the UK to follow future changes in EU standards are either misguided or disingenuous.

## Being world-leading

Meaningful commitments to non-regression are essential if the UK is to authentically put itself forward as a 'world-leader' in environmental protection. This means a strong and enforceable non-regression principle forming a core component of the UK's environmental policy, both internal and external.

The robustness offered by a domestic principle is necessary, but so too is the globally-facing nature of non-regression in international agreements made by the UK (including, but not limited to, trade agreements). Given the demonstrable weaknesses of non-regression in existing trade agreements, the UK must improve on these in future, making non-regression an environmental principle, not one aimed at the prevention of trade distortion.

The UK should advocate for the adoption of binding commitments to non-regression in new multilateral environmental agreements. It should also make strong, broad and enforceable non-regression clauses a pre-requisite for new trade agreements. Together, this will also give the UK leverage to ensure that standards do not drop elsewhere in the world.

Greener UK therefore recommends incorporation of an environmental non-regression principle into domestic law. The Environment Bill provides an ideal opportunity for this. All public authorities must be required to act in accordance with this principle in the formation and implementation of law and policy.

This briefing was written by Dr Tom West, Law and Policy Adviser at ClientEarth, on behalf of the Greener UK coalition.

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## Endnotes

1 Article 4(3).

2 HM Government, 'The Future Relationship between the United Kingdom and the European Union', July 2018, paras 108, 118.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/725288/The\\_future\\_relationship\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_European\\_Union.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf)

3 See Article 2(1) ICESCR and UN Committee on Economic, Social and Cultural Rights, General Comment 3 (14 December 1990).

4 Article 10: "Substantive and procedural rules for environmental conservation shall be maintained without regression, and interpreted and applied in favour of ecological integrity, unless compelling reasons of public interest require otherwise..."

5 Article 17: "The Parties and their sub-national entities refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law."

6 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (UN ECLAC 2018), Article 3(c).

7 Loi n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages. Art 2(4).

8 Constitution of the Republic of Ecuador (20 October 2008) Article 423(3).

9 Conseil d'État, 8 décembre 2017, Fédération Allier Nature ([link](#)); Tribunal administratif de La Réunion, 14 décembre 2017, Association Citoyenne de Saint-Pierre ([link](#)); Conseil d'État, 14 juin 2018, Fédération environnement durable ([link](#)).

10 In Fédération Allier Nature.

11 For the importance of these, see Greener UK 'The governance gap: why Brexit could weaken environmental protections' (August 2017).

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